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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Reportable
Case no: A117/2026

In the matter between:

JORDAN MIKAEL HERZENBERG **Appellant**

AND

GM LOUBSER FAMILY TRUST **First Respondent**
ELIZABETH LOUBSER **Second Respondent**
KATHERINE LOUBSER **Third Respondent**

Coram: **LEKHULENI, J et BARTHUS, AJ**
Heard: 21 August 2026
Delivered Electronically: 30 October 2026
Summary: **Spoliation** — Mandament van spolie — Requirements — Peaceful and undisturbed possession — Applicant's occupation arose solely from romantic relationship and domestic goodwill — No autonomous control over access established — Absence of own keys relevant within broader factual matrix — Tolerated and shared occupation insufficient to constitute protected possession.
Interdict — Final interdict sought in addition to mandament — Broader enquiry into underlying facts and asserted rights permissible — Applicant required to establish clear right — No contractual, proprietary, or personal right to remain in occupation proved — Withdrawal of tolerated access not an infringement of a legally protected right.

Appeal — Cross-appeal — Attempt to appeal against reasons rather than order — Impermissible — Appeal and cross-appeal dismissed.

ORDER

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1. The appeal is dismissed.
2. The cross-appeal is dismissed.
3. Condonation is granted for the late filing of the heads of argument.
4. The Appellant shall pay the costs of the appeal on Scale B, including the costs of Counsel.
5. The Respondents shall pay the costs occasioned by the cross-appeal on Scale B including the cost of counsel.

JUDGMENT

Barthus, AJ (Lekhuleni, J concurring)

INTRODUCTION

[1] This appeal concerns the dismissal of a mandament van spolie application brought in the Magistrate's Court for the District of Malmesbury. The dispute arises from a domestic arrangement rather than any commercial or contractual relationship.

[2] The Appellant resided at 9[...] M[...] Road, Yzerfontein ("the Property") solely because of his romantic relationship with the Third Respondent and the goodwill of the Second Respondent, the Third Respondent's mother. When the relationship ended, the Respondents removed the keys from behind the kitchen door, thereby preventing the Appellant from entering or remaining on the premises. The Appellant approached the Magistrate's Court seeking restoration of possession.

[3] The Magistrate dismissed the application. The Appellant now appeals that dismissal. The Respondents filed a cross-appeal directed only at the Magistrate's reasons.

[4] The Appellant's litigation strategy is central to the appeal. By seeking final interdictory relief in addition to the mandament, he placed the asserted legal basis of his continued occupation in issue for purposes of that additional relief. This permitted

a rights-based enquiry that would have been impermissible in determining the spoliation claim alone. The two enquiries nevertheless remained distinct: the mandament depended upon factual possession and unlawful dispossession, whereas the final interdict required proof of a clear right, an injury actually committed or reasonably apprehended, and the absence of an adequate alternative remedy.

[5] The appeal therefore turns on two interrelated questions: first, whether the Appellant proved peaceful and undisturbed possession for purposes of the mandament; and second, whether he established a clear right for purposes of the final interdict. The Respondents' cross-appeal also requires brief consideration.

PRELIMINARY ISSUES

The cross-appeal and condonation for the late filing of the heads of argument

[6] The Respondents also seek condonation for the late filing of their heads of argument. That application is unopposed, offers an adequate explanation, and causes no prejudice. Condonation for the late filing of the heads of argument should accordingly be granted.

[7] The Respondents obtained the precise order they sought: dismissal of the appeal. Their cross-appeal is directed only at aspects of the Magistrate's reasoning. It is settled that an appeal lies against the substantive order of a court, not the reasons given for it. In ***Neotel (Pty) Ltd v Telkom SA SOC Ltd and Others***[1], the Supreme Court of Appeal confirmed that an appellate court lacks jurisdiction to entertain an appeal directed only at reasons where the operative order is not challenged. The cross-appeal is accordingly impermissible and must be dismissed. Its late filing is immaterial.

[8] It is convenient to consider the appeal in three stages. First, I address whether the Appellant's founding papers established peaceful and undisturbed possession for purposes of the mandament. Second, assuming in his favour that any pleading deficiency may be overlooked, I consider whether the evidence establishes corpus and animus. Third, I address the distinct claim for final interdictory relief.

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[1] (605/2016) [2017] ZASCA 47.

FACTUAL BACKGROUND

[9] The Appellant began residing at the Property in March 2025. His occupation was informal and arose from his romantic relationship with the Third Respondent and the Second Respondent's goodwill. The Property is the Respondents' family home, and the Appellant's presence was accommodated within that domestic arrangement.

[10] The romantic relationship ended in November 2025. Shortly thereafter, the Respondents retrieved the keys to the Property from the hook behind the kitchen door. The Appellant nevertheless continued to access the Property until his removal.

[11] It is also significant that, in the eviction application subsequently initiated and later withdrawn by the Respondents, they explained the basis upon which the Appellant had been permitted to reside at the Property. In that application, the Respondents stated that the Appellant had been allowed to live with them because his parents were in the throes of a divorce and he required a quiet and stable environment in which to study for his examinations.

[12] That explanation accords with the Appellant's own account of how he came to reside at the Property.

[13] A rule nisi was granted directing restoration of possession. The sheriff's attempts to execute the order were resisted, necessitating a second order authorising the sheriff to change the locks. The Respondents then handed over a single key.

[14] The Appellant later alleged that he was assaulted by two men inside the Property. Those alleged events occurred after the Respondents had taken the keys and after the alleged spoliation. They therefore do not assist in determining whether, before the alleged deprivation, the Appellant had peaceful and undisturbed possession of the quality required for the mandament.

THE MANDAMENT VAN SPOLIE

The Nature and Purpose of the Mandament

[15] The mandament van spolie is a remedy of narrow and specific application. It protects factual possession, not rights or entitlement. Its purpose is to restore the status quo ante by reversing unlawful dispossession, without determining the merits of the underlying dispute or the parties' rights.

[16] In ***Yeko v Qana,***[2] the Appellate Division, as it then was, confirmed that an applicant must allege and prove two jurisdictional facts: peaceful and undisturbed possession before the deprivation, and unlawful dispossession. The Constitutional Court reaffirmed the remedy's anti-self-help purpose in ***Ngqukumba v Minister of Safety and Security and Others***[3], ***Nieuwoudt v Steyn and Another***[4] (‘***Nieuwoudt')*** and ***Bond v Harman-Leak and Others***[5] (***"Harman-Leak"***) are recent High Court decisions applying those orthodox requirements.

[17] The mandament restores possession; it does not enforce rights or elevate tolerated access into a legally enforceable entitlement.

Pleading Defect: The Bare Assertion of Possession

[18] The Appellant's founding affidavit contains a single, unadorned assertion that he "*enjoyed peaceful and undisturbed possession*" of the Property. It does not explain how he exercised that possession, what incidents of control he enjoyed, or whether he possessed keys, regulated access, excluded others, or regarded himself as possessor. The assertion is therefore conclusory rather than factual.

[19] The omission is material because the jurisdictional facts must be established by primary facts, not by merely repeating the conclusion that possession was peaceful and undisturbed. ***Harman-Leak*** confirms, in the context of quasi-possession, that actual exercise must be pleaded and proved; a bare allegation of a right or ability to exercise control is insufficient. Similarly, ***Faku and Another v City of Ekurhuleni Metropolitan Municipality***[6] held that an allegation framed in the language of spoliation, without supporting facts establishing the asserted incidence of possession, is fatally deficient.

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[2] 1973 (4) SA 735 (A).
[3] 2014 (2) SACR 325 (CC) (15 May 2014).
[4] [2025] ZAGPHC 60 (22 January 2025).
[5] (2026/051129) [2026] ZAGPJHC 273 (18 March 2026).
[6] [2026] ZAGP JHC 273 (18 March 2026).

[20] The Appellant's counsel invited this Court to infer possession from the surrounding circumstances. A court may draw proper inferences from pleaded primary facts, but it may not construct an unpleaded case or supply the factual foundation for a jurisdictional requirement. The question is therefore whether the facts actually alleged, taken at their highest, establish a sufficiently stable and effective measure of physical control coupled with the intention to hold for the Appellant's own benefit.

[21] The defect is not cured by the duration of the Appellant's residence or by the fact of occupation itself. The founding papers do not allege facts showing that his residence transcended tolerated domestic occupation or that he exercised the corpus and *animus* required for protected possession.

[22] The Appellant's case therefore cannot engage the mandament's protective function. Although he uses the language of the remedy, he does not plead the facts necessary to sustain it: peaceful and undisturbed possession, corpus, and animus.

[23] ***Nieuwoudt*** does not establish that occupation arising from a romantic relationship is, without more, merely tolerated or incapable of protection. Restoration was granted because the applicant had occupied the property for years, made renovations and improvements, asserted a lien, and was dispossessed despite pending eviction litigation known to the purchaser. Those features provided objective evidence of settled control and an intention to possess for the applicant's own benefit; they are absent here. Although the pleading deficiency is dispositive of the mandament, I consider in the alternative whether the evidence as a whole establishes corpus and animus.

APPLICATION OF LAW TO THE FACTS

Corpus (Physical Control)

[24] Even if the pleading deficiency is overlooked in the Appellant's favour, the evidence must still establish corpus. The enquiry is whether his occupation afforded him a sufficiently stable and effective measure of physical control over the Property immediately before the alleged dispossession.

[25] The Appellant's occupation was not shown to be exclusive or autonomous. He lived within the Respondents' household, did not regulate access, secure or maintain the premises, exclude others, or otherwise exercise independent control over the space. On this record, his occupation remained embedded within the Respondents' domestic arrangements and was relational and tolerated rather than possessory.

[26] Physical control is assessed practically and in context; neither exclusivity nor the possession of a personal set of keys is an invariable legal requirement. Shared or mediated access may nevertheless fall short where the alleged possessor cannot enter, remain, regulate use, or otherwise exercise a sufficiently stable measure of control. The evidence about keys is therefore relevant only as one part of the broader factual matrix.

[27] In the present matter, the Appellant alleges residence at the Property but does not identify any room or area under his control, any possessions kept there as indicia of settled occupation, any independent means of entry, or any conduct by which he regulated use of the premises. The keys remained inside the Respondents' home and were used within an arrangement controlled by them. That fact is not decisive by itself, but, read with the absence of pleaded acts of control, it does not establish the effective physical control required for corpus.

[28] In ***De Beer v Zimbali Estate Management Association (Pty) Ltd and Another***[7], Nicholson J reviewed the distinction between access and possession for purposes of the mandament. The decision confirms that the enquiry remains whether the applicant exercised possession or quasi-possession of the requisite quality, rather than merely enjoying access dependent on another's control.

Animus (Intention to Possess for One's Own Benefit)

[29] *Animus* possidendi requires an intention to hold the property as possessor for one's own benefit, assessed objectively from the surrounding facts. The enquiry is not whether the Appellant had a legal right to possess, but whether his conduct demonstrated possession of the requisite quality rather than mere residence by tolerance.

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[7] (6711/05) [2006] ZAKZHC 21; 2007 (3) SA 254 (N) (11 May 2006).

[30] The fact that the Appellant's occupation began through a romantic relationship and permission does not, without more, negate animus: a permissive occupier may possess for their own benefit, and the mandament does not ask whether that occupation was lawful. What matters is the objective quality of the occupation. Unlike the applicant in *Nieuwoudt* the Appellant pleaded no improvements, lien, contribution, demarcated area of control, independent access, or other conduct showing that he held the Property, or an identifiable part of it, as possessor rather than as a member of the Respondents' household.

[31] Animus cannot be rejected merely because the Respondents later withdrew permission. The withdrawal of consent does not retrospectively determine whether possession existed immediately before the deprivation. The difficulty for the Appellant is evidential: the founding papers do not allege objective acts by which he manifested an intention to hold the premises for his own benefit before access was withdrawn.

[32] On the facts pleaded, the Appellant's occupation remained dependent on the Respondents' tolerance and domestic arrangements. He alleged no objective conduct demonstrating an intention to hold the Property, or an identifiable part of it, as possessor for his own benefit.

[33] In ***Ivanov v North West Gambling Board and Others***[8], the Supreme Court of Appeal confirmed that the mandament protects factual possession rather than rights, and that even unlawful possession may qualify for restoration. That principle assists the Appellant only if factual possession is first established.

[34] The recent authorities therefore require a fact-sensitive enquiry. Cohabitation, permission, shared access, and the absence of a personal key are not individually dispositive. On these papers, however, their combined significance lies in the absence of pleaded facts showing effective control and an intention to possess for the Appellant's own benefit. The Appellant accordingly failed to establish peaceful and undisturbed possession immediately before the alleged deprivation.

The Landlord-Tenant Analogy Advanced by the Appellant

[8] (312/2011) [2012] ZASCA 92; 2012 (6) SA 67 (SCA) (31 May 2012).

[35] The Appellant sought to liken his occupation of the Property to that of a tenant, relying on the duration of his residence and the absence of interference before the romantic relationship ended. The analogy is misplaced. A tenancy ordinarily involves contractual entitlement, defined possession, autonomous control, and an ability to exclude. None of those features was present here: the Appellant's occupation was relational rather than contractual, tolerated rather than bargained for, and subject to the Respondents' authority.

Final interdictory relief

[36] The Appellant's claim for final interdictory relief required a separate rights-based enquiry. ***Street Pole Ads Durban (Pty) Ltd and Another v eThekwini Municipality***[9] explains that additional non-spoliatory relief may open the door to a consideration of the asserted right. ***Harman-Leak*** restates the qualification: a respondent may not challenge the applicant's right merely because it is mentioned; the merits become relevant where the alleged right is relied upon as part of the cause of action for further, non-spoliatory relief. Here, the Appellant sought a final interdict and was therefore required to establish the clear right on which that relief depended.

[37] In ***Setlogelo v Setlogelo*** [10], the Appellate Division stated the requirements for final interdictory relief: a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy. The Appellant did not allege any basis for a clear right. His occupation arose from his romantic relationship with the Third Respondent and the Second Respondent's goodwill. He asserted no contractual entitlement, proprietary interest, or other legal foundation entitling him to remain on the Property or regulate access to it.

[38] The Appellant also failed to establish an injury in the legal sense required for final interdictory relief. The keys were kept on a hook inside the Respondents' home and used by the Appellant with their permission. By removing and retaining them when the relationship ended, the Respondents withdrew that permission; they did not take keys held independently by the Appellant or infringe an established right of access.

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[9] 2008(5) SA290 (SCA) (28 March 2008).
[10] 1914 AD 221 at 227.

[39] The removal of the keys from the hook may have terminated the Appellant's practical ability to access the Property, but on the case pleaded it did not infringe any legally protected rights. The mandament cannot create or enforce rights, and an interdict cannot be granted in the absence of a right. The Appellant's complaint is, at its highest, the loss of tolerated access. On these facts, tolerated access was not shown to be a right capable of protection by interdict.

[40] The Appellant also failed to establish the absence of an adequate alternative remedy. Had he possessed a contractual or personal right to remain on the Property, he could have pursued a claim founded on that right. He alleged no such entitlement and identified no unavailable remedy. A final interdict cannot cure that deficiency by creating an underlying right of access.

[41] The requirements for final interdictory relief were therefore not established.

[42] The distinction between the remedies is decisive: the spoliation claim concerns factual possession, whereas the final interdict depends upon an enforceable right.

Conclusion

[43] The spoliation claim fails because the Appellant did not plead or establish factual possession of the requisite quality immediately before the alleged dispossession. That conclusion does not depend upon whether he had a legal right to occupy the Property. The claim for final interdictory relief fails independently because he established no contractual, proprietary, or personal right entitling him to remain in occupation or regulate access. The appeal must therefore be dismissed.

ORDER

[44] In the result, I propose the following order:

1. The appeal is dismissed.
2. The cross-appeal is dismissed.
3. Condonation is granted for the late filing of the heads of argument.

4. The Appellant shall pay the costs of the appeal on Scale B, including the costs of Counsel.
5. The Respondents shall pay the costs occasioned by the cross-appeal on Scale B including the cost of Counsel.

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V BARTHUS

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

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J LEKHULENI

JUDGE OF THE HIGH COURT

Appearances

For Appellant:	ADV ALEXANDER GLOOR
Instructed by:	MHI Attorneys
For Respondents:	ADV D PETERSEN
Instructed by:	Brink & Thomas Inc